Supreme Court, U.S.
FILED
MAR 20 1990
JOSEPH F. SAPNIOL, JR.
CLERK

Nos. 89-609; 89-1358

In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

ALEXANDRA and ESTHER KALOA;
ALEC and OLGA CONSTANTINE,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Table of Contents

Table of authorities cited..... ii

Counterstatement of the case..... 1

Reasons the writs should be denied. 8

I. The Ninth Circuit Correctly Decided The Issues On Which Petitioners Seek Review And Those Issues In Any Event Are Not Substantial..... 10

A. NVT Is An Indian Tribe Recognized By The United States And, Consequently, Possesses Sovereign Immunity From Unconsented Suit..... 11

B. The Alaska Native Claims Settlement Act Confirms NVT's Tribal Status..... 18

C. Petitioners' Constitutional And Civil Rights Claims Do Not Override NVT's Sovereign Immunity From Suit... 23

D. NVT Has Not Waived Its Sovereign Immunity..... 26

E. NVT's Officers Are Immune From Petitioners' Counterclaims..... 31

II. Petitioners In No. 89-1358 Do Not Have Standing To Petition For A Writ Of Certiorari..... 34

III. NVT Has Not Engaged In Racial Discrimination Prohibited By The Constitution Or Federal Law..... 36

Conclusion..... 38

TABLE OF AUTHORITIES CITED

Cases:

Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162 (9th Cir. 1982).... 17

Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477 (D. Alaska 1985), aff'd., 806 F.2d 924 (9th Cir. 1986)..... 14

American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985)..... 28

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, __U.S.__, 109 S.Ct. 2994 (1989)..... 27

Buster v. Wright, 135 F. 947 (8th Cir. 1905), app. dism., 203 U.S. 599 (1905)..... 22

Cherokee Nation v. Georgia, 30 U.S. 1 (1931)..... 38

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303, (10th Cir. 1989)..... 29

Dry Creek Lodge, Inc. v. Arapaho-Shoshone Tribe, 623 F.2d 682 (10th Cir. 1980), cert. den., 449 U.S. 1118 (1981)..... 30

Edwardsen v. Morton, 369 F.Supp. 1359 (D.D.C. 1978)..... 19

Elk v. Wilkins, 112 U.S. 94 (1884)..... 38

Enterprise Management Consultants Inc. v. United States ex rel. Hodel, 883 F.2d 890 (10th Cir. 1989)..... 30

Ex parte Young, 209 U.S. 123 (1908)..... 34

Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971)..... 17

Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970)..... 27, 28

Hurd v. Hodge, 334 U.S. 24 (1948) 37

In re Minook, 2 Ak.Rpts. 200 (D. Alaska 1904)..... 17

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).. 29

Lynch v. United States, 292 U.S. 571 (1934)..... 23

Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966)..... 27

Mattz v. Arnett, 412 U.S. 481 (1973)..... 22

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).....22, 32, 36

Montana v. United States, 450 U.S. 544 (1981)..... 32, 36

Nagle v. United States, 191 F. 141 (9th Cir. 1911)..... 17

Namekagon Development Co. v. Boise Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975)..... 27, 28

Native Village of Noatak v. Hoffman, ___F.2d___ (9th Cir. 1990)..... 15, 21

Native Village of Stevens v. Alaska Management and Planning, 757 P.2d 32 (Alaska 1988)..... 17

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)..... 15

Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977) 18

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).. 19

Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989)..... 29

Petition of McCord, 151 F.Supp. 132 (D. Alaska 1957)..... 17

Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977)..... 23, 34

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert.den., 472 U.S. 1016 (1985). 30

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 23, 27, 29, 30, 31, 34, 37

Seneca-Cayuga Tribe v. State ex rel. Thompson, 874 F.2d 709 (10th Cir. 1989)..... 27

Shelley v. Kraemer, 334 U.S. 1 (1948)..... 37

Squaxin Island Tribe v. Washington, 781 F.2d 715 (9th Cir. 1986)..... 29

State of Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988)..... 15

Territory of Alaska v. Annette Island Packing Co., 289 F. 671 (9th Cir. 1923)..... 17

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986)..... 23

United States v. Atlantic Richfield Co., 435 F.Supp. 1009, (D. Alaska 1977), aff'd., 612 F.2d 1132 (9th Cir. 1980), cert. den., 449 U.S. 888 (1980)..... 19

United States v. Berrigan, 2 Ak.Rpts. 442 (D. Alaska 1905). 14

United States v. Booth, 161 F. Supp. 269 (D. Alaska 1958)..... 17

United States v. Cadzow, 5 Ak.Rpts. 125 (D. Alaska 1914). 14

United States v. Chavez, 290 U.S. 357 (1933)..... 22

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981).. 29

United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. den., 459 U.S. 823 (1982). 22

United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940)..... 23, 28

United States v. Wright, 51 F.2d 300 (4th Cir. 1931), cert. den., 285 U.S. 539 (1932)..... 22

Constitution and statutes:

United States Constitution
Fifth Amendment..... 38
Fourteenth Amendment..... 38

1866 Civil Rights Act..... 38

18 U.S.C. sec. 1151(b)..... 22

18 U.S.C. sec. 1162..... 16

25 U.S.C. sec. 398b..... 17, 31

25 U.S.C. sec. 450b(e)..... 16, 20

25 U.S.C. sec. 476..... 12, 15, 19, 22, 32

25 U.S.C. sec. 1301..... 30

25 U.S.C. sec. 1302..... 38

25 U.S.C. sec. 1452(c)..... 16, 20

25 U.S.C. sec. 1903(8)..... 16, 20

26 U.S.C. sec. 7701(40)..... 16

28 U.S.C. sec. 1360..... 16

42 U.S.C. sec. 3603..... 38

43 U.S.C. sec. 1601..... 12

43 U.S.C. sec. 1601(b)..... 21

43 U.S.C. sec. 1601(g)..... 21

43 U.S.C. sec. 1602(c)..... 21

43 U.S.C. sec. 1626(d)..... 21

Rules and Federal Register notices:

Rule 13(a) of the Federal Rules of Civil Procedure..... 28

47 F.R. 53130..... 14

48 F.R. 21378..... 20

48 F.R. 30195..... 20

51 F.R. 25115..... 14

51 F.R. 28779..... 20

Miscellaneous:

Final Report, American Indian Policy Review Commission, 95th Cong. 1st Sess. (May 17, 1977). 21

Leasing Lands Within Indian Reservations Created for the Benefit of the Natives of Alaska, 49 I.D. 592 (1923)..... 14

Status of Alaskan Natives, 53 I.D. 593 (1932)..... 14

Status of the Native Village of Tyonek Under the Alaska Native Claims Settlement Act, Opinion of the Solicitor of the Department of the Interior (Sept. 13, 1972), Clerk's Record No. 83... 21, 22

Niedermeyer, "The True Interests Of A White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady, 21 N.Y.U. Journal of International Law and Politics 195 (1988)..... 10

Oil and Gas Leasing on Lands Withdrawn by Executive Order for Indian Purposes in Alaska, 70 I.D. 166 (1963)..... 13, 14

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NATIVE VILLAGE OF TYONEK,

Respondent.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Counterstatement of the Case

The respondent Native Village of

Tyonek (hereinafter "NVT") opposes the petitions for a writ of certiorari.

As the District Court found and the Ninth Circuit affirmed, this case has nothing to do with racial discrimination or with the violation of any person's civil rights. Rather, the case concerns NVT's right as a federally recognized Indian tribe to make and enforce laws essential to the tribe's political, economic and social security.

In 1965, NVT's members had a critical need for housing. Using more than $2 million of its own tribal funds, NVT constructed 60 houses for its members under a plan approved by the Secretary of the Interior pursuant to federal law. Before the houses were completed, NVT enacted a law prohibiting tribal members from leasing or renting any of these houses to

nonmembers. Upon completion, tribal members were given the houses free of charge. Petitioners Kaloas received one of these houses; petitioners Constantines received another.

In 1981, the Pucketts, nonmembers of the tribe who had never before resided in the village, requested NVT's permission to lease the Kaloas' house until June, 1982. Permission was granted upon condition that the Pucketts vacate the Kaloas' house and leave the village at the end of the lease term. In April, 1982, two days after NVT notified the Pucketts regarding the June date to vacate the Kaloas' house and leave the village, the Pucketts executed a one-year extension of their lease without informing NVT. Thereafter, they refused to respond to all requests from NVT to leave the village, ignored NVT's notice following expiration of the initial lease term that

they no longer had permission to lease the Kaloas' house, and continued to reside in the Kaloas' house.

Also in 1981, the Slawsons, nonmembers of the tribe, sought NVT's permission to reside in the village. Permission was denied. Five months later, the Slawson's rented the Constantines' house. Three days after moving in, they asked NVT for permission to rent the Constantines' house. Although permission was again denied, the Slawson's continued to reside in the Constantines' house.

NVT brought this action to exclude petitioners Pucketts and Slawsons from the tribal community and to enjoin petitioners Kaloas and Constantines from leasing their houses to nonmembers. The petitioners in No. 89-609 counterclaimed for declaratory and injunctive relief and for compensatory

and punitive damages against NVT and its officers, alleging that enforcement of NVT's laws prohibiting them from residing in the tribal community and renting houses set aside for tribal members violated constitutional and various statutory guarantees of their civil rights. The petitioners in No. 89-1358 have also charged NVT with impermissible racial discrimination.

In challenging the legitimacy of NVT's laws governing the right of nonmembers to remain in the tribal community and the leasing of certain homes by members, petitioners have sought to tar NVT and its officers for promoting an ideology and practice of "racial purity" and for inciting racial hatred. These statements are merely fabricated histrionic posturings designed to capture this Court's attention by inflaming passions and to enlist the

Court in petitioners' crusade to destroy the foundations of tribal self-government rights in Alaska. Not only do these statements have no basis in the record, as the courts below at least implicitly found, the uncontradicted record demonstrates that NVT's laws promote rights recognized in federal law. These laws have several purposes including maintaining NVT as an Athabascan tribal community, securing NVT's political integrity, protecting tribal assets and resources, and providing homes and employment for tribal members. Clerk's Record No. 50, Ex. A. NVT's laws conditioned the nonmember petitioners' entry and continued presence in the tribal community and the grant of the houses to the member petitioners.

The petitioners in No. 89-1358 moved to dismiss the complaint on the ground that federal courts should not exercise

jurisdiction over tribal claims that, if sustained, would sanction tribal racial discrimination. The District Court granted the motion to dismiss, however, on the ground that the complaint did not assert a basis for federal question jurisdiction. NVT appealed this ruling; so did the petitioners. The Ninth Circuit held that the petitioners had no standing to appeal and affirmed the District Court's dismissal of the complaint as to these petitioners.

The petitioners in No. 89-609 and NVT moved the District Court for summary judgment. The District Court, sua sponte, dismissed NVT's complaint for lack of federal question jurisdiction and dismissed petitioners' counterclaims as barred by NVT's sovereign immunity. The District Court also found no evidence that NVT's officers in any way harassed petitioners or committed any acts of vandalism with

respect to petitioners' property. On appeal, the Ninth Circuit affirmed the dismissal of the counterclaims and reversed the dismissal of NVT's complaint, remanding to the District Court the trial of NVT's complaint against these petitioners. The trial has not yet occurred and perhaps never will. Since the petitioners in No. 89-609 moved from the village several years ago and the petitioners in No. 89-1358 have been dismissed as parties, NVT's action may be moot.

REASONS THE WRITS SHOULD BE DENIED

Petitioners now seek writs of certiorari from this Court. Not surprisingly, they and the State of Alaska as amicus curiae offer no arguments that

were not fully litigated, considered, and decided against them both by the District Court and the Court of Appeals. Moreover, the issues petitioners ask this Court to address challenge rulings that do no more than reconfirm long settled law. These issues have no substantial significance outside of Alaska and have significance in Alaska only because the State of Alaska has sought in recent years, albeit unsuccessfully, to carve out an Alaska exception to the body of federal Indian law generally applicable throughout the rest of the United States.

This Court ordinarily does not grant certiorari where the law is settled. The Ninth Circuit's decision is not in conflict with decisions of any of the other Courts of Appeals. While, as petitioners and the State of Alaska note, dicta in a recent decision of the Alaska Supreme Court

appears to be in conflict with the rulings below, this decision ignored the applicable law and instead relied on ancient federal court decisions [1] effectively stripped of any validity by subsequent federal court decisions and congressional action. With respect to NVT, even this decision followed and is not in conflict with the decisions below. Petitioners claims have been properly rejected and there is no substantial reason for this Court to grant further review.

I. THE NINTH CIRCUIT CORRECTLY DECIDED THE ISSUES ON WHICH PETITIONERS SEEK REVIEW AND THOSE ISSUES IN ANY EVENT ARE NOT SUBSTANTIAL.

Despite the fact that the issues

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[1] See, Niedermeyer, "The True Interests Of A White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady, 21 N.Y.U. Journal of International Law and Politics 195 (1988), analyzing and discrediting each of these decisions.

raised seek to have this Court overturn long established principles of law not in dispute outside of Alaska, petitioners have attempted to construct "questions presented" which have broader application. Petitioners' efforts notwithstanding, none of those issues merits this Court's attention.

A. NVT Is An Indian Tribe Recognized By The United States And, Consequently, Possesses Sovereign Immunity From Unconsented Suit.

Petitioners accept that if NVT is an Indian tribe, NVT's sovereign immunity, absent waiver thereof, bars their counterclaims. Accordingly, petitioners urge this Court to review the rulings below that NVT is an Indian tribe.

The District Court concluded that "based upon Tyonek's history and the manner

in which the Federal government has dealt with Tyonek, that the Village possesses sovereign immunity from suit like that of any other Indian tribes...." Pet. in No. 89-609 at App. 24. Pertinent to the District Court's conclusion were, inter alia, the facts that ancestors of NVT's members had inhabited Tyonek and its environs for more than 200 years, the United States had established a reservation for the Indians of the Tyonek area, these reservation Indians organized under the Indian Reorganization Act, 25 U.S.C. sec. 476, and thereafter enacted laws governing both members and nonmembers of the tribe, and the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), 43 U.S.C. sec. 1601 et seq., settled NVT's aboriginal land claims without affecting NVT's tribal status or self-government rights. Id. at 10-14.

The facts relied upon by the District Court substantially abbreviated the evidentiary record of United States' recognition of NVT's tribal status. From the time Alaska was purchased in 1867, the tribal status of the Athabascan Indians of Tyonek, as well as the tribal status of other Alaska Native communities, has been repeatedly recognized by every branch of the federal government and has not been differentiated from the status of tribes outside of Alaska.

An express purpose of the reservation established by President Wilson for the Athabascan Indians of the Tyonek area was protecting the ability of "such tribes" to be "self-support[ing] and industr[ious]" by insulating them against "white intrusion." Oil and Gas Leasing on Lands Withdrawn by Executive Order for Indian Purposes in

Alaska, 70 I.D. 166, 175-176 (1963). [2] Subsequently, the Department of the Interior has recognized NVT's tribal status. See e.g., id; Leasing Lands Within Indian Reservations Created for the Benefit of the Natives of Alaska, 49 I.D. 592, 592-593 (1923); Status of Alaskan Natives, 53 I.D. 593, 605 (1932); 47 F.R. 53130, 53135; 51 F.R. 25115, 25119.

In 1939, the Secretary of the Interior

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[2] Throughout the history of the United States, the federal government has regulated and controlled non-Indian entry into Indian country and has evicted non-Indians who violated these regulations. See e.g., United States v. Cadzow, 5 Ak. Rpts. 125 (D. Alaska 1914); United States v. Berrigan, 2 Ak. Rpts. 442 (D. Alaska 1905). A purpose of ANCSA was to protect Native villages against an influx of non-Natives. Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477, 1494 (D. Alaska 1985), aff'd., 806 F.2d 924 (9th Cir. 1986). This national policy sought to protect the Indian minority from exploitation and abuse by the non-Indian majority. The need for this policy, including in Alaska, has not abated.

approved NVT's organization under the Indian Reorganization Act, further confirming NVT's tribal status. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-335, 335 n.17 (1983). [3]

NVT has also been the beneficiary of numerous services and programs administered exclusively for Indian tribes by the Bureau of Indian Affairs, the Indian Health Service, the Department of Housing and

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[3] Petitioners erroneously cite State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1387 (9th Cir. 1988), as holding that Indian Reorganization Act ("IRA") organization is not conclusive evidence of tribal status. Pet. in No. 89-609 at 10-11. As Native Village of Noatak v. Hoffman, ___F.2d___ (9thCir. 1990), Sl.Op. at 1493, clarified, IRA organization is conclusive evidence of tribal status where no uncertainty exists concerning the structure of the tribal entity involved. Moreover, the District Court and the Ninth Circuit did not ground NVT's tribal status on IRA organization alone. Rather, IRA organization was but one of a number of aspects of NVT's history that in combination supported the conclusion that NVT is an Indian tribe.

Urban Development, the Department of Education, the Department of Health and Human Services, and the Department of the Treasury.

Congress has also recognized the tribal status of Alaska Native villages like NVT by applying to them the general law governing state jurisdiction in Indian country, 18 U.S.C. sec. 1162 and 28 U.S.C. sec. 1360, and by expressly recognizing the right of these villages as tribes to participate in and receive the benefits of every statute authorizing programs and benefits for Indian tribes and their members. **See e.g.**, Indian Self-Determination Act, 25 U.S.C. sec. 450b(e); Indian Financing Act, 25 U.S.C. sec. 1452(c); Indian Child Welfare Act, 25 U.S.C. sec. 1903(8); Indian Tribal Government Tax Status Act, 26 U.S.C. sec. 7701(40).

For many years, the courts have also recognized NVT's tribal status. See e.g., Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162, 1169 n. 10 (9th Cir. 1982); Fondahn v. Native Village of Tyonek, 450 F.2d 520, 521 (9th Cir. 1971)(construing 25 U.S.C. sec. 398b, a statute only applicable to "tribe[s] of Indians"); Territory of Alaska v. Annette Island Packing Co., 289 F. 671, 674 (9th Cir. 1923); Nagle v. United States, 191 F. 141, 142 (9th Cir. 1911); United States v. Booth, 161 F.Supp. 269, 271, 273 (D. Alaska 1958); Petition of McCord, 151 F.Supp. 132, 133, 136 (D. Alaska 1957); In re Minook, 2 Ak. Rpts. 200, 220-221 (D. Alaska 1904). Even the Alaska Supreme Court in Native Village of Stevens v. Alaska Management and Planning, 757 P.2d 32, 35-36 n. 4 (1988), acknowledged that NVT may indeed have

tribal status. See also, Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977).

B. The Alaska Native Claims Settlement Act Confirms NVT's Tribal Status.

The facts that ANCSA revoked NVT's reservation and that a state-chartered corporation organized and owned by NVT's members pursuant to ANCSA now holds title to most of the lands of the former reservation, including the lands occupied by the petitioners' Kaloas' and Constantines' houses, do not affect NVT's tribal status or sovereign immunity from suit.

The District Court concluded that ANCSA "did not expressly change the status of Tyonek or its IRA Village government," Pet. in No. 89-609 at App. 14, and "does

not contain any provisions explicitly mentioning or waiving the immunity [from suit] of village governments organized under IRA section 16." Id. at App. 27 n. 13. ANCSA, as well as every judicial and other construction of its provisions, support these conclusions.

It has been repeatedly observed that ANCSA's only purpose was to settle the aboriginal land claims of Alaska Natives. See e.g., United States v. Atlantic Richfield Co., 435 F.Supp. 1009, 1018, 1021, 1022, 1031 (D. Alaska 1977), aff'd., 612 F.2d 1132 (9th Cir. 1980), cert. den., 449 U.S. 888 (1980); Edwardsen v. Morton, 369 F. Supp. 1359, 1365, 1376, 1378 (D.D.C. 1978). Such claims may only be asserted by tribes. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Nothing in ANCSA terminated the tribal status of any of the Alaska Native villages, including NVT. And, nothing in ANCSA waived the

sovereign immunity from suit of these villages. The tribal status of Alaska Native villages is apparent from the fact that in every post-ANCSA federal statute of general applicability to Indian tribes, Alaska Native villages have been treated as Indian tribes. **See e.g.**, Indian Self-Determination Act, 25 U.S.C. sec. 450b(e); Indian Financing Act, 25 U.S.C. sec. 1452(c); Indian Child Welfare Act, 25 U.S.C. sec. 1903(8). In addition, the Secretary of the Interior, post-ANCSA, has continued in Alaska to apply Indian liquor laws only applicable in Indian country. **See e.g.**, 51 F.R. 28779; 48 F.R. 30195; 48 F.R. 21378.

In fact, ANCSA explicitly recognizes the tribal status of NVT and the other Alaska Native villages. ANCSA lands and other benefits are expressly provided for and on behalf of "Native villages," a term defined to mean "any tribe, band, clan,

group, village, community, or association in Alaska...composed of twenty-five or more Natives." 43 U.S.C. sec. 1602(c). ANCSA also provided for an ongoing federal wardship and trusteeship with respect to Alaska Natives. 43 U.S.C. sec. 1601(b) and (g); 43 U.S.C. sec. 1626(d). **See also,** Native Village of Noatak v. Hoffman, supra, 81.Op. at 1493 (ANCSA is congressional recognition of the tribal status of Alaska Native villages); Final Report to the Congress of the American Indian Policy Review Commission, 95th Cong. 1st Sess. 490-492 (May 17, 1977)(ANCSA did not terminate the tribal status or sovereign powers of any Alaska Native villages); Status of the Native Village of Tyonek Under the Alaska Native Claims Settlement Act, Opinion of the Solicitor of the Department of the Interior (Sept. 13, 1972), Clerk's Record No. 83 ("Except for the revocation of its reservation...the

village's status and powers as a governmental and as a corporate entity under the Indian Reorganization Act continue undiminished"). [4]

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[4] The fact that pursuant to ANCSA a corporation owned by NVT's members now owns the lands of NVT's former reservation also does not terminate the Indian country status of these lands, Mattz v. Arnett, 412 U.S. 481, 490, 497 (1973); United States v. Chavez, 290 U.S. 357, 364 (1933); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. den., 459 U.S. 823 (1982); 18 U.S.C. sec. 1151(b), or diminish NVT's sovereign powers to govern those who inhabit or enter the Indian country under its jurisdiction. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145, 145 n. 11 (1982); Mattz v. Arnett, supra, 412 U.S. at 497; United States v. Wright, 51 F.2d 300, 306 (4th Cir. 1931), cert. den., 285 U.S. 539 (1932); Buster v. Wright, 135 F. 947, 951-952 (8th Cir. 1905), app. dism., 203 U.S. 599 (1905).

C. Petitioners' Constitutional and Civil Rights Claims Do Not Override NVT's Sovereign Immunity From Suit.

Ever since United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940), dozens of decisions have reiterated the settled law that the sovereign immunity of Indian tribes, absent federal diminution, is coextensive with that of the United States. **See e.g.,** Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-891 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165, 172-173 (1977). This immunity applies to constitutional and statutory claims. Lynch v. United States, 292 U.S. 571, 582 (1934). The District Court, and the Court of Appeals in affirming, have correctly and unexceptionably adhered to these

principles. Pet. in No. 89-609 at App. 25-26.

Petitioners do not dispute the settled law on tribal sovereign immunity; they just ask the Court to overturn it. In support of this request, they argue that NVT does not have the sovereign authority to determine whether nonmembers of the tribe can reside in the village of Tyonek or rent homes that NVT constructed for tribal members.

Essentially petitioners seek to condition NVT's sovereign immunity on a determination of the merits of their claims. But, as the District Court noted, immunity from suit is jurisdictional and must be determined without regard to the merits of petitioners' claims. Pet. in No. 89-609 at

App. 26-27. [5]

Petitioners would make tribes amenable to unconsented suit for money damages. To do so would destroy tribal sovereignty and self-governance, radically and fundamentally altering the status of tribes under federal law and seriously threatening their economic security and cultural autonomy. Nothing in this case justifies these far-reaching and perilous consequences.

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[5] If NVT's action proceeds to trial and petitioners defend (as they have in their answer) on the basis that NVT's actions exceeded its sovereign powers, a judgment in petitioners' favor is likely if the defense is sustained. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, ___U.S.___, 109 S.Ct. 2994 (1989)(federal courts have authority to determine whether Indian tribes' sovereign powers permit regulation of nonmember activities within the tribal community and to enter judgment against tribes where such powers have been exceeded).

D. NVT Has Not Waived Its Sovereign Immunity.

In asking this Court to review the determinations below that NVT's sovereign immunity has not been waived, petitioners again seek to overturn well-established legal principles.

While NVT does have a "sue and be sued" clause in its corporate charter, it does not have such a clause in its constitution. The courts below correctly found that all of NVT's actions at issue were tribal governmental actions undertaken pursuant to constitutional, and not corporate charter, authority. These findings are clearly supported by the fact that petitioners counterclaims challenged the legitimacy of two tribal laws and the enforcement of these laws. The District Court's ruling that "sue and be sued"

clauses in a tribe's corporate charter "waive the tribe's immunity only with regard to actions taken by the tribe in its corporate capacity...and not the actions it takes in its governmental capacity," Pet. in No. 89-609 at App. 31-32, is in accord with this Court's longstanding doctrine that waivers of sovereign immunity must be unequivocally and unambiguously expressed. Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 58-59. It also follows a substantial line of authority applicable to tribal charter "sue and be sued" clauses. See e.g., Seneca-Cayuga Tribe v. State ex rel. Thompson, 874 F.2d 709, 715 n. 9 (10th Cir. 1989); Namekagon Development Co. v. Boise Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975); Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520-521 (5th Cir. 1966).

Even assuming that Fontenelle v. Omaha

Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970), supports a rule that "sue and be sued" tribal corporate charter clauses waive the sovereign immunity of tribes for actions undertaken in a governmental capacity, Fontenelle has been superseded by Namekagon Development Co. and by American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379-1380 (8th Cir. 1985), decisions of the Eighth Circuit that are consistent with the rulings of the Fifth, Ninth and Tenth Circuits on this issue.

Petitioners also seek review of the rulings below that Rule 13(a) of the Federal Rules of Civil Procedure did not waive NVT's sovereign immunity. This Court long ago held that tribal sovereign immunity extends to counterclaims. United States v. United States Fidelity and Guaranty Co., supra, 309 U.S. at 513. The circuit courts of appeal also reject

petitioners' position. See e.g., Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303, 1304-1305 (10th Cir. 1989); Squaxin Island Tribe v. Washington, 781 F.2d 715, 723 (9th Cir. 1986). [6]

Finally, in direct opposition to this Court's holding in Santa Clara Pueblo v. Martinez, supra, petitioners maintain that

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[6] Petitioners rely on United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), and Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982), to support a claim that there is law conflicting with the rulings below. If conflict exists, these cases have been superseded respectively by Squaxin Island Tribe and Citizen Band Potawatomi Indian Tribe of Oklahoma. In fact, no conflict exists. Jicarilla Apache Tribe involved a claim in recoupment not, as here, a counterclaim for money damages against a tribe. And, United States v. Oregon, involving a tribe that unlike NVT had expressly consented to be bound by a federal court judgment, was clarified in Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419-420 (9th Cir. 1989), in a way that eliminates any disharmony between that case and subsequent Ninth Circuit decisions upholding tribal immunity from unconsented counterclaims.

the Indian Civil Rights Act, 25 U.S.C. sec. 1301 et seq., waived NVT's sovereign immunity. The rulings below followed Santa Clara Pueblo. Petitioners seek review on the premise that these rulings conflict with a purportedly applicable exception to Santa Clara Pueblo adopted by the Tenth Circuit in Dry Creek Lodge, Inc. v. Arapaho-Shoshone Tribe, 623 F.2d 682 (10th Cir. 1980), cert.den., 449 U.S. 1118 (1981). While the Ninth Circuit has flatly rejected this exception, R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 981 (9th Cir. 1983), cert.den., 472 U.S. 1016 (1985), ever since Dry Creek Lodge, the Tenth Circuit in a number of decisions has back pedaled away from it and has stressed that Dry Creek Lodge is to be very narrowly construed and applied in only the most extreme circumstances. See e.g., Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890,

892 (10th Cir. 1989). Santa Clara Pueblo is dispositive. Petitioners offer no valid basis for this Court to review it.

E. NVT's Officers Are Immune From Petitioners' Counterclaims.

The courts below concluded that NVT's officers are immune from petitioners' counterclaims because in seeking to enforce NVT's laws, they acted within the scope of their authority and within the scope of NVT's sovereign powers. The District Court concluded that because the houses petitioners sought to rent were built with tribal funds held in trust by the United States pursuant to federal law for the sole benefit of tribal members, NVT had the authority to restrict the use of these houses to members of the tribe. In addition to the fact that NVT's laws restricting nonmember use of these houses carries out the purposes of 25 U.S.C. sec. 398b and is

expressly sanctioned by 25 U.S.C. sec. 476, this Court's decisions establishing the right of tribes to regulate nonmembers' activities in the tribal community also support NVT's actions.

Montana v. United States, 450 U.S. 544, 563-566 (1981), held that tribes may regulate the activities of nonmembers who enter consensual relationships with the tribe or tribal members and exercise civil authority over the conduct of nonmembers "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." All of petitioners' activities in seeking NVT's permission to reside in the village and rent certain houses involved consensual relationships with the tribe and tribal members. Moreover, the undisputed evidence presented on the cross-motions for summary judgment was clear that NVT's actions sought to

protect a threat to its political integrity, economic security, health and welfare. Clerk's Record No. 50, Ex. A.

Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 144, also held that tribes may place conditions on nonmembers' entry into and on their continued presence and conduct in the tribal community, rights that include the power to exclude nonmembers. Petitioners' entry and continued presence in NVT's community was conditioned on compliance with NVT's laws governing entry and occupancy of the homes built with tribal funds. Petitioners deliberately violated these laws, actions that resulted in NVT's efforts to exclude them from the tribal community. In light of Merrion, when a tribe exercises its power to exclude nonmembers it legitimately promotes self-government and is not

engaging in unlawful activity. [7]

Even if NVT's officers had not acted in a representative capacity, the District Court made findings of fact, after review of a substantial evidentiary record, that there is no evidence of any actionable conduct by these officers. Pet. in No. 89-609 at App. 16-17, 33.

II. PETITIONERS IN NO. 89-1358 DO NOT HAVE STANDING TO PETITION FOR A WRIT OF CERTIORARI.

Petitioners Kaloas and Constantines

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[7] In stating that the rulings below conflict with Santa Clara Pueblo v. Martinez, supra, and Puyallup Tribe, Inc. v. Department of Game of Washington, supra, the State of Alaska completely misrepresents the holdings of these cases. By referring to Ex parte Young, 209 U.S. 123 (1908), Santa Clara Pueblo, 436 U.S. at 59, only restated the principle that tribal officers are not immune from suit for unlawful actions. The rulings below are not in conflict. They simply affirmed that the actions of NVT's officers were lawful and, therefore, protected by NVT's sovereign immunity.

moved to dismiss in the District Court. Their motion was granted, albeit for reasons different from those argued in support of dismissal. Not satisfied with the grounds for dismissal, these petitioners appealed. The Ninth Circuit affirmed the dismissal, again on grounds petitioners find unsatisfactory. In affirming, the Ninth Circuit held that having obtained dismissal of the complaint in the District Court, these petitioners have no standing to appeal. Supp. Br. in No. 89-609 at 13900-13901. Since the Ninth Circuit has affirmed the dismissal of the complaint against these petitioners, they have no standing to petition this Court for further review simply because they would prefer the basis for the dismissal to be different. Id.

III. NVT HAS NOT ENGAGED IN RACIAL DISCRIMINATION PROHIBITED BY THE CONSTITUTION OR FEDERAL LAW.

Assuming that petitioners in No. 89-1358 have standing, their racial discrimination claims are without merit and, in effect, were rejected by the rulings below dismissing the counterclaims of the petitioners in No. 89-609.

NVT's action to exclude the petitioners in No. 89-609 and to enforce Ordinance No. 65-32 with respect to the petitioners in No. 89-1358 are not based on prohibited racial discrimination. These were governmental acts taken for legitimate governmental purposes. **See** Clerk's Record No. 50, Ex. A; Standifer deposition at 55-58. NVT has the governmental powers to exclude nonmembers, Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 147-152, to regulate the consensual relationships entered into between tribal members and

nonmembers, Montana v. United States, supra, 450 U.S. at 563-566, and to control internal and social relations, Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 55. These powers necessarily include the right to limit or condition the ability of tribal members to rent homes to nonmembers. Thus in bringing an action in federal court to exclude the nonmember petitioners and to compel the tribal member petitioners, now no longer parties, to comply with tribal law governing the rental of their houses, NVT does not seek enforcement of private racially restrictive covenants, the focus of Shelley v. Kraemer, 334 U.S. 1 (1948), and Hurd v. Hodge, 334 U.S. 24 (1948). Rather, NVT seeks federal court enforcement of its governmental rights sanctioned by federal law. Accordingly, NVT has not

violated any applicable civil rights laws. [8]

CONCLUSION

Upon consideration of all of the arguments presented here and a thorough evidentiary record, the courts below concluded that NVT is an Indian tribe possessing sovereign immunity from unconsented suit. These decisions raise no novel issues and are anchored in and

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[8] The Indian Civil Rights Act, 25 U.S.C. sec. 1302, is the only civil rights law applicable to NVT. The Fifth and Fourteenth Amendments are inapplicable. Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 56-57. The 1866 Civil Rights Act also does not apply. That law applied only to United States citizens. In 1866, Indian tribes and their members were not citizens. Elk v. Wilkins, 112 U.S. 94, 99-100 (1884); Cherokee Nation v. Georgia, 30 U.S. 1, 16, 19-20 (1831). And, even assuming that the Fair Housing Act applies to tribes, the racial discrimination that it prohibits is limited to circumstances not part of the facts in this case. 42 U.S.C. sec. 3603.

reflect a body of law about which there is no dispute. Further review by this Court is not merited.

Respectfully submitted,

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